

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1228

Cir. Ct. No. 2014CV371

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

LARRY WITTMANN,

PETITIONER-APPELLANT,

V.

**CONSOLIDATED LUMBER CO. D/B/A ARROW BUILDING CENTER,
ACUITY INSURANCE COMPANY AND STATE OF WISCONSIN LABOR AND
INDUSTRY REVIEW COMMISSION,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Polk County:
MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Larry Wittmann appeals a circuit court order affirming a Labor and Industry Review Commission (LIRC) decision denying his

claim for temporary total disability benefits under WIS. STAT. § 102.43 (2015-16).¹ Wittmann argues the LIRC erroneously determined his “healing period” had ended prior to the time he claims to have suffered a wage loss. We disagree and conclude the LIRC’s findings were based upon credible and substantial evidence. Accordingly, we affirm the order.

BACKGROUND

¶2 On October 31, 2007, Wittmann fell and injured his right ankle while working as a salesperson for Consolidated Lumber Company, doing business as Arrow Building Center (Arrow). An x-ray of the ankle revealed Wittmann suffered a non-displaced spiral fracture of his right fibula.

¶3 Wittmann was referred to Dr. Mark Wikenheiser, who treated the ankle non-operatively by placing it in a splint and walking boot and recommended physical therapy. After the injury, Wittmann continued to work full-time for Arrow and, as a salaried employee, lost no wages because of the injury. Wittmann was never given any medical work restrictions. At first, he used a wheelchair in order to perform his work at Arrow. On December 18, 2007, Wikenheiser recommended Wittmann transition to crutches, which he did in January 2008. Throughout several visits, Wikenheiser examined x-rays of the ankle and opined that it was progressively improving. On January 16, 2008, Wikenheiser recommended that Wittmann resume full weight-bearing on his injured ankle without use of a boot or crutches. After a February 27, 2008 examination, Wikenheiser assessed Wittmann’s ankle as follows: “Fracture findings are

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

positive for callus formation, evidence of bony growth, fracture healed, fracture healing, good alignment and radiographic evidence of healing. There is no displacement. X-ray shows normal alignment. There is no dislocation. Pattern is spiral.”

¶4 Wittmann was terminated from his sales position at Arrow on November 18, 2008.² In early 2009, Wikenheiser referred him to Dr. Scott McGarvey, a foot and ankle specialist. On February 23, 2009, McGarvey ordered an MRI of Wittmann’s ankle which revealed possible cartilage and ligament defects. On December 7, 2010, Wittmann visited McGarvey again, and he expressly declined McGarvey’s offer to perform surgery on his ankle.

¶5 Wittmann filed a worker’s compensation claim with the Wisconsin Department of Workforce Development seeking temporary total disability benefits due to the ankle injury for the period from his date of termination on November 18, 2008, to January 6, 2012. Wittmann cited a medical report prepared by Dr. Michael Lockheart, in which Lockheart determined Wittman’s ankle had not fully healed until January 6, 2012.

¶6 After an evidentiary hearing, the administrative law judge (ALJ) determined Wittmann did not qualify for temporary total disability benefits during the claimed period as a result of his ankle injury.³ The ALJ relied upon an

² Wittmann regained employment at a home improvement store on August 2, 2012. The record is unclear if Wittmann was unemployed during the entire intervening period. Because neither Arrow nor the LIRC argues to the contrary, we assume he was.

³ The ALJ also rejected Wittmann’s claim that he suffered a knee injury as a result of his fall at work and that the knee healed on the same date his ankle did, finding that Wittmann complained of no knee pain in the emergency room report. Wittmann did not renew the knee claim in his appeal to the LIRC.

independent medical examination report prepared by Dr. Thomas O'Brien. O'Brien opined that after reviewing Wittmann's medical records, including Dr. Wikenheiser's reports, Wittmann's fibular fracture had healed on February 27, 2008. The ALJ also concluded that because Wittmann was never placed under work restrictions by a physician and lost no wages, he was not entitled to any disability benefits at any point after his employment was terminated.

¶7 Wittman appealed this decision to the LIRC, which affirmed the ALJ's decision and expressly adopted its findings of fact and conclusions of law. The LIRC relied upon Dr. O'Brien's report that determined the healing period ended on February 27, 2008, stating it did so "even if [the LIRC] were to find the report of Dr. Lockheart to be credible." Wittmann appealed to the circuit court, which affirmed the LIRC's decision. Wittman now appeals that order.

DISCUSSION

¶8 Under WIS. STAT. § 102.43, temporary total disability benefits are "due as wages ... after the employee leaves work as the result of an injury, and shall be payable weekly thereafter, during such disability." The term of leave is known as the "healing period." *GTC Auto Parts v. LIRC*, 184 Wis. 2d 450, 460, 516 N.W.2d 393 (1994). "The healing period is understood to mean ... the period prior to the time when the condition becomes stationary. ... The interval may continue until the employee is restored so far as the permanent character of his injuries will permit." *Id.* at 460-61 (quoting *Knobbe v. Industrial Comm'n*, 208 Wis. 185, 189-90, 242 N.W. 501 (1932)). An employee is entitled to temporary total disability benefits if he or she is terminated from employment during the "healing period," thereby suffering a wage loss. *See Emmpak Foods, Inc. v. LIRC*, 2007 WI App 164, ¶10, 303 Wis. 2d 771, 737 N.W.2d 60.

¶9 We review the findings and conclusions of the LIRC rather than the circuit court. *Id.*, ¶3. The issue here is whether the LIRC’s determination that the “healing period” ended on February 27, 2008, is supported by substantial evidence in the record.⁴ The determination of the extent and duration of the “healing period” is a question of fact. See *Brakebush Bros. v. LIRC*, 210 Wis. 2d 623, 629, 563 N.W.2d 512 (1997). The LIRC’s findings of fact are conclusive, in the absence of fraud, and shall be upheld if they are supported by substantial evidence. WIS. STAT. § 102.23(1)(a), (6). “Substantial evidence” refers to “credible, relevant, and probative evidence upon which reasonable persons could rely to reach a decision.” *Sills v. Walworth Cty. Land Mgmt. Comm.*, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878. “[T]he weight and credibility of medical evidence are to be determined by LIRC” and not by a reviewing court. *Brakebush Bros.*, 210 Wis. 2d at 630.

¶10 As an initial matter, we note that Wittmann has alleged through every level of review in this case—including now—that he was terminated because of his injured ankle. Wittmann’s employee exit form stated Arrow terminated him “pertaining to lack of business.” However, Wittmann testified before the ALJ that he believed he was terminated because a customer complained about his immobility caused by the ankle injury when he was visiting a construction site. Wittmann appears to make much of this “fact,” but, at best, the

⁴ Wittmann also disputes the LIRC’s conclusion of law that temporary medical work restrictions are a condition precedent to receiving temporary total disability benefits. However, we may resolve this case on the LIRC’s factual findings; that is, Wittmann’s “healing period” ended and he suffered no wage loss. We therefore address neither the proper level of deference to afford the LIRC’s conclusion nor whether temporary work restrictions are required to receive temporary total disability benefits. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1., 268 Wis. 2d 628, 673 N.W.2d 716 (appellate courts need only address dispositive issues).

record is unclear on this issue. In any event, resolution of any factual dispute involving the reason for Wittmann's termination is inconsequential to the issue of when his healing period ended.

¶11 Wittmann argues the LIRC's findings of fact concerning his healing period were unsupported by credible and substantial evidence. Wittmann claims he was still actively treating his ankle from 2008 to 2012 and further contends Dr. O'Brien's report, upon which the ALJ and the LIRC relied, "is directly contrary to the undisputed medical evidence." In support, Wittmann cites the conclusions in Dr. Lockheart's report in addition to the fact that he was still seeing physicians regarding right leg problems for a period after Arrow terminated his employment.

¶12 We disagree with Wittman. Doctor Lockheart's report indicates there were possible complications with Wittmann's ankle lingering after the initial injury. However, the emergency room report on the date of Wittmann's accident indicated he only suffered a fractured fibula. Doctor O'Brien's report, as well as the LIRC, relied upon Dr. Wikenheiser's determination that the bone injury was healed on February 27, 2008. The mere fact that Wittmann continued to seek treatment for other problems with his leg after he was terminated from his employment does not make unreasonable a factual finding that the "healing period" ended on February 27, 2008. Further, there is evidence in the record from which the LIRC could reasonably conclude the ankle injury did not persist for nearly four years after it occurred. Wittmann returned to work at Arrow without any restriction after the injury, and he continued to work there nearly a full year. There were notable delays between Wittmann's various visits with Dr. McGarvey regarding possible collateral injuries he may have suffered during his fall. Notably, Wittmann elected not to have surgery when offered the possibility of

doing so. These facts all lend support to the LIRC's decision that Wittmann's fibular injury had become "stationary" on February 7, 2008, well prior to his termination. *See Knobbe*, 208 Wis. at 189-90. The LIRC's inference from the evidence is reasonable, and is thus decisive. *Sills*, 254 Wis. 2d 538, ¶11.

¶13 Wittmann's case is, to some extent, a duel of the doctors' reports. Doctor O'Brien's report determined the fracture in Wittman's leg had healed, relying upon Wittmann's medical records and Dr. Wikenheiser's past report. Doctor Lockheart's report disagreed, noting the possible existence of ligament and cartilage injury that occurred because of the fall. The LIRC resolved the dispute in favor of conclusions reached in Dr. O'Brien's report, impliedly finding Dr. Lockheart's report less credible. As noted, only the LIRC may weigh the medical evidence and make credibility determinations. *See Brakebush Bros.*, 210 Wis. 2d at 630. Wittmann may disagree with these determinations, but our role is not to retry his case.

¶14 Because the LIRC's findings rested on credible and substantial evidence, we conclude the LIRC properly denied Wittmann temporary total disability benefits and affirm the circuit court order upholding that decision.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).

